

Dated: 10/14/97

Case No.: 96-ERA-2

In the Matter of

ALBERT AGOSTO
Complainant

v.

CONSOLIDATION EDISON CO. OF N.Y., Inc.

and

RAYTHEON QUALITY PROGRAMS CO.
Respondents

Albert Agosto, *pro se*

Kenneth G. Standard, Esq.
Larry Carbone, Esq.
New York, New York
For Consolidated Edison Company

James Remeika, Esq.
Lexington, Massachusetts
For Raytheon Quality Programs Co.

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a case arising under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851 (“ERA”). A formal hearing was held in New York City on the following dates: August 27-30, September 4-6, 17-20, and 25-26, 1996. At the hearing, the record was kept open for Consolidated Edison Company (“Con Ed”) to file the report of Dr. Telson. That report was filed in a timely manner and is admitted into evidence as Con Ed Exhibit 390.¹ Complainant was then given the opportunity to have Dr. Telson answer interrogatories in lieu of cross-examination. Dr. Telson’s answers to complainant’s interrogatories were finally filed

¹Citations to the record of this proceeding will be abbreviated as follows: CX--Complainant’s Exhibit; CE--Con Ed Exhibit; TR--Hearing Transcript.

on December 10, 1996, and they are admitted into evidence as Con Ed Exhibit 390-A. The parties were then ordered to file post-hearing briefs. Claimant moved to reopen the record, but that motion was denied on February 26, 1997. The parties were granted a short extension of the deadline to file their briefs, until March 14th. All of the briefs were filed in a timely manner.

Complainant contends that he was harassed by Con Ed supervisory personnel while performing inspections and was discriminated against by Con Ed for complaints he made to the Nuclear Regulatory Commission's on-site inspectors. Con Ed denies that complainant engaged in protected activity under the ERA, and furthermore states that any job-related actions involving the complainant were taken for legitimate, non-discriminatory reasons. It has been Raytheon's position from the beginning that it should be dismissed from this case because complainant has not alleged that it engaged in any wrongdoing.² Based on the evidence contained in the record of this proceeding, it is recommended that this case be dismissed.

As I think is clear from the record, complainant was given every opportunity to develop his evidence and present his case. Nevertheless, although complainant is an intelligent and articulate man, he was seriously handicapped by appearing *pro se* both because of his lack of legal expertise (including trial skills) and his emotional involvement in the case. Regardless, I do not believe that he would have been successful even if he had been represented by the finest counsel, since there is no evidence of unlawful discrimination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Background

The complainant, Albert Agosto, is 42 years old and is of Puerto Rican descent. He was raised in Brooklyn, New York, and still lives there with his wife and daughter. He is a high school graduate. Complainant has worked as a quality control inspector in the nuclear industry since 1980, which was the first time he worked for Con Ed (TR 1270-71). As a quality control inspector, complainant is not employed by the utility at which he works, nor is he paid by the utility. Rather, he is an employee of a contractor who provides his services to the utility, usually

²Nevertheless, I refused to dismiss Raytheon as a party to this case since Raytheon, not Con Ed, was complainant's actual employer and therefore is the party that actually laid complainant off on June 26, 1995. Although the complainant has not alleged that Raytheon should be found liable for the alleged unlawful discrimination by Con Ed, the application of the principles of joint employment or vicarious liability to hold the actual employer liable for the unlawful acts of the licensee for whom the employee performs his job duties is an untested question. *Cf. Palmer v. Western Truck Manpower*, 85-STA-16 (March 13, 1992) (Secretary's *Decision and Order on Remand*). Since complainant is *pro se*, and could not be expected to raise a theory of vicarious liability or joint employment, I believed that his failure to specifically allege that Raytheon could bear responsibility for Con Ed's actions was not dispositive of this issue, and that the most prudent course was to continue to include Raytheon as a party in this case. *See, e.g., Order Denying Motion To Dismiss [Raytheon]* dated June 11, 1996.

for a period of six months or less (*see, e.g.*, CX 44). The longest continuous period complainant worked for a utility was from May 1983 to October 1985 when he worked as an inspector for Illinois Power Company as an employee of U.S. Testing Co. (*id.*).

Let me preface the discussion of the merits of this case by noting that I have come to know Mr. Agosto very well during the course of this lengthy proceeding, from the protracted and contentious pre-trial period through a very long hearing and then a protracted post-hearing period. Since he has been representing himself throughout this time, I have had more direct interaction with him than I have had with any other individual party in any of the cases I have heard as a judge, and I have come to like him a great deal. He has many admirable qualities. He is intelligent, articulate, hard working, and tenacious, and the record indicates that he is a technically proficient inspector (*e.g.*, CX 49; CE 222, at 39; TR at 685-86, 2100, 3092). It is these qualities which explain his successful career as a quality control inspector. However, with apologies to *Star Wars*, complainant has a dark side. He can be distrustful, arrogant, overly aggressive, duplicitous and vindictive, which can make him extremely exasperating to deal with (*see, e.g.*, TR at 685-86, 2561-67, 2763-65, 2782, 2924-25, 2943-44, 3098-99, 3227-36; CE 46-47). In this regard, complainant's performance evaluations from the summer of 1994 (CE 46-47) reflect his difficulty in getting along with co-workers and supervisory personnel. Moreover, he is vain and macho, and sees all disagreement and criticism, however benign, as a loss of face and a challenge to his virility. These characteristics make him inordinately confrontational (*see, e.g.*, TR at 1880-1903), and explain why an inconsequential disagreement which occurred on February 21, 1995 has escalated into this major lawsuit which has needlessly absorbed so much of complainant's time and energy over the past two years.

Complainant worked at Con Ed's Indian Point 2 Nuclear Power Station ("Indian Point" or "IP 2") in Buchanan, New York as a welding inspector on three occasions. The first period was from November, 1980 through June, 1981, during which time his employer was U.S. Testing Co. He returned to Indian Point in February, 1993, as an employee of Ebasco Services, Inc. On this occasion he worked at Indian Point for seven months, through September, 1993. At the end of 1993 or the beginning of 1994, Ebasco was purchased by Raytheon (TR 2008), so when the claimant returned to Indian Point in January, 1994 it was as an employee of Raytheon (CX 44).

Complainant's first two periods of employment at Indian Point appear to have been uneventful. His third period of employment there began after Con Ed stopped utilizing Bechtel for its construction work at IP 2. Since Bechtel had provided its own quality control ("QC") inspectors, Con Ed had to replace them. Complainant was one of the two QC inspectors brought on at that time, the other being Luis Valenzuela (*see* TR at 2064-66). Complainant contends that he was hired in January, 1994 on a long term-basis, that is, for a period of several years (TR at 1682-83, 1759-60). However, the evidence does not support this. John Curry, the Director of Nuclear Quality Assurance at Con Ed, testified that the two QC inspectors hired in January, 1994 were hired with the expectation that they would work through the 1995 outage (a period where the power generating equipment is shut down) planned for refueling (TR at 2065-66). Similar testimony was given by John Moore, who in 1994 was Raytheon's field service manager for its

outage inspection business (TR at 2008- 11; *cf.* TR at 3220-22). Their testimony is supported by Ebasco's December 9, 1993 letter to complainant confirming his acceptance of their offer of a "temporary assignment" beginning on January 10, 1994 for a period "anticipated" to be less than one year (CE 266), as well as complainant's receipt of per diem payments from the beginning of this period of employment, an indication that his employment was considered temporary (TR at 2014-15, 1696-99; CE 329-36). Finally, as noted above, complainant has never worked longer than 2 1/2 years on any one job since becoming an inspector in the nuclear power industry.

The key event in regard to this case occurred on February 21, 1995. But prior to getting to that incident another incident must be discussed, since it had a major impact on the events of February 21, 1995. On October 27, 1994, complainant was reprimanded and suspended without pay for two days for threatening to beat up fellow QC inspector Luis Valenzuela (*e.g.*, CX 26-1; TR at 286, 289). It is clear from complainant's demeanor whenever this incident came up during the hearing that he is unapologetic about having threatened Valenzuela, for whom he has little respect either personally or professionally (TR at 1717-23, 3243). Valenzuela was transferred to another job where he did not have to work with complainant subsequent to this incident (TR at 3385). That complainant was suspended for this incident but no one was suspended for the February 21, 1995 incident continues to enrage the complainant (*e.g.*, TR at 1376-77, 1713-15; *cf.* CX 13, at 4-5), and is the primary reason he has not let this matter die the quiet death it deserves. Complainant still refuses to acknowledge that there is a material difference between maliciously threatening to beat up a co-worker, on the one hand, and having a spontaneous verbal altercation regarding a disagreement over work procedures on the other.

As one might expect, there are many different versions of what occurred on February 21, 1995 contained in the record. Complainant's version, which I have no doubt he believes is accurate, is that on the date in question, at approximately 12:30 p.m., he was in the Emergency Diesel Generator Building when Joseph Sikora, a foreman in the Construction Department, asked him to perform a visual inspection of a weld hold point. It is now clear that no inspection of this weld was required (*see, e.g.*, CX 2), and complainant states that is what he told Sikora (TR at 1276). Complainant concedes that it would have taken only a few seconds to have performed the inspection, and performing the inspection would not have broken any rules (TR at 1280, 1281; *cf.* TR at 3161-62).³ Nevertheless, since he believed the inspection was not required, he refused to perform it. He says he was then harassed, by which he means he was yelled at, grabbed, and had a finger pointed at him, first by Sikora and subsequently by another Con Ed employee, Richard Doyle, in an effort to get him to perform the inspection (TR at 1277-79). He was attempting to call the quality assurance supervisors⁴ to find out if the weld had to be inspected when he states that Sikora grabbed his sleeve and yelled at him to put down the phone (TR at 1279), and Doyle

³In fact, according to Con Ed's QC Supervisor, Sergei Brozski, it is not unusual for QC inspectors to perform inspections that are not required, particularly in cases such as this where the inspection is quick and the inspector is right there to do it (TR at 3395-97).

⁴Quality Assurance ("QA") is often used interchangeably with "Quality Control" ("QC").

threatened “to have me removed if I did not inspect and sign the weld.” (TR at 1284) He asked the quality assurance supervisors to come over to the Emergency Diesel Generator Building and mediate the argument, and by the time they arrived a few minutes later everything was under control (TR at 1297). In the meantime, he performed the inspection “under duress.” (TR at 1292) The entire incident lasted five to ten minutes (TR at 1296).

Complainant summed up the incident as follows:

The actions of Doyle and Sikora compelled me to perform an inspection against my will and forcibly impeded my inspection duties by obstructing the way I’d perform my duties and by opposing my decision to ask questions with regard to the work package and the calling of my supervisor

(TR at 1292).

There are many instances in this case where complainant’s description of events is contradicted by the testimony of other witnesses. For the most part, I have resolved these conflicts against the complainant’s version of these events. My observation of the complainant during the three weeks of trial and my thorough examination of the record leads me to conclude that complainant is so emotionally involved in this case and the incidents leading to it that his memory is highly selective and therefore unreliable. At other times complainant contradicts himself. Further, where significant conflicts occur, complainant’s testimony usually is contradicted by more than one other person, sometimes including people called as witnesses by the complainant or others who would appear to be unbiased. In regard to the occurrences on February 21, 1995, I cannot accept complainant’s testimony. Rather, based on piecing together the consistent parts of the somewhat divergent testimony and statements of numerous people, I find that the following is what actually occurred.

On that day, in the Emergency Diesel Generator Building, several different jobs were going on (TR at 2243-44). At around lunch time, Sikora came in to inspect some work which was being performed by two mechanics he was supervising when Sikora heard complainant talking to two other mechanics (TR at 3279). Complainant was telling these mechanics that their job was all messed up, so he came over to see what was going on even though he was not supervising this particular job (TR at 3282). Complainant told him that a root pass weld which was being done by two mechanics, Keith McCarthy and David Singh, had to be inspected even though the Weld Information Form (“WIF”) for it indicated that an inspection was not required (TR at 3284-85; *see also* TR at 840-41, 2247). Complainant also contended that inspections should have been performed on similar welds on a job that had already been completed (TR at 3282-83). Sikora and complainant then had a discussion regarding whether the WIF was correct. But in case complainant was right and the root pass the mechanics were working on had to be inspected, Sikora asked complainant to inspect the root pass to permit the ongoing work to continue (TR at 3290). Complainant initially agreed to this, so the mechanics completed the weld, which took about a minute or two, and Sikora went over to where complainant was inspecting

another job and asked him to inspect the weld (TR at 3293). As complainant was heading over to the weld, he veered off to the telephone, saying that he was going to check with Michael Ferretti, who is one of the Quality Assurance supervisors (TR at 3293-94). In order to give complainant time to inspect the weld, Sikora offered to place the call himself, figuring that by the time they got Ferretti on the line complainant would have finished the inspection (TR at 3294-95). For some reason this made complainant very angry, and an argument between complainant and Sikora ensued (TR at 832-33, 1276, 3295). At some point Sikora pulled on complainant's shirt, apparently to get his attention while complainant was talking on the phone (TR at 2248-49); and complainant loudly told Sikora that he should not tell him what to do or impede his inspection (TR at 3297-98, 2249), and that as a nuclear inspector Sikora should not speak to him that way (TR at 838).

At this time Doyle, a senior maintenance engineer who had been observing the conversation, stepped in. He told complainant that if he believed the weld had to be inspected, then he should inspect it. Complainant responded that Doyle should not tell him what to do, that complainant will tell them when he is going to do an inspection (TR at 2249, 3298). Complainant then threatened to leave the building, and Doyle said that if he did they would get another inspector to inspect the weld (TR 2249, 3300). Apparently for a short time the conversation between complainant, Sikora and then Doyle got somewhat heated, but not to the point that they were screaming at each other (TR at 839). Doyle then left the building. In the meantime, complainant would not perform the inspection (TR at 3300). Finally, Sikora went to the phone to call Ferretti, who said he and Bob Trombetta were coming down to the building to see what was going on. While Sikora was on the phone with Ferretti, complainant performed the inspection and signed off on it, and the welders started completing their work (TR at 3299-3300). According to at least two people who witnessed the incident, it was no worse than other arguments among workers which happen on a regular basis (TR at 838-89, 2642, 2651-52).

Following this incident, complainant went to see the NRC on-site inspector, Gordon Hunegs. He did not relate anything of the incident at the Emergency Diesel Generator Building to Hunegs; rather, he asked Hunegs about NRC requirements regarding harassment, and Hunegs gave him an applicable NRC publication (CE 223, at 25-28). Complainant did not even mention that an incident had occurred earlier that day (*id.* at 26-27). In fact, from February 21st until Hunegs left IP2 in late May or early June of 1995, complainant did not indicate to him that he was experiencing any problems at work (*id.* at 28-29). Complainant first informed an NRC inspector of the February 21st incident when he went to see Barry Westreich, another NRC on-site inspector, at IP 2, in May, 1995 (CE 222, at 33-34).

Either just before or just after his meeting with Hunegs,⁵ complainant went to see Sergei Brozski, Con Ed's QC Manager (TR at 1294-95). Brozski testified that, prior to this meeting, he ascertained that the WIF was correct and the root pass weld did not have to be inspected (TR at 3392). At the meeting, which Bob Trombetta also attended, complainant was very agitated (TR

⁵See note 9 *infra* and the accompanying text.

at 3394-95). He also took contrary positions, first arguing that the weld had to be inspected and then complaining that he was coerced into performing an inspection that was not required (*id.*). He also contended that Sikora and Doyle should be suspended for their actions against him as he was for threatening Valenzuela (TR 1317). When complainant did not calm down as the meeting progressed, Brozski attempted to determine why he was so agitated, and asked him how many days in a row he had been working (TR at 3398, 2473). Complainant stated that it was his seventh day in a row without a day off, during which time he had worked about 72 hours (TR at 3398-3400).⁶ Brozski was disturbed about this since he had set a policy with his QC supervisors that QC inspectors should not work more than six days or a total of 72 hours without a day off (TR at 3400-01). Accordingly, although complainant was scheduled to work on the next day -- February 22 -- Brozski told him to take that day off (TR at 3400-01, 2473-74).⁷

Following the meeting with complainant, Brozski met with Sikora to further discuss the incident at the Diesel Generator Building (TR at 3409). Since Doyle had already left for the day, he telephoned Doyle at home to get his version of the incident (CX 5, at 3). He chastised Doyle for threatening to take disciplinary action against complainant, since he did not have the authority to do so (*id.*). Brozski also reported to John Curry, Con Ed's Director of Nuclear Quality Assurance, on the evening of February 21st, that one of their inspectors, Al Agosto, had been threatened in regard to the performance of an inspection (TR at 2067).

Brozski continued his investigation of the incident over the next two days. On February 23, he and Curry met with complainant (TR at 2069). Curry wanted complainant to know that Doyle had no authority to fire him or remove him from an inspection (TR at 2070). He also wanted complainant to be aware that he had the right to go to Con Ed's ombudsman or the NRC inspector to express his concerns (TR at 2071; *see also* CX 15-1). Complainant failed to indicate that he had already seen both the NRC inspector, on February 21, and the ombudsman, Diane Poirier, earlier that morning (TR 2073, 2078). After meeting with the complainant, Curry met with the Plant Manager, Tom Schmeiser, to inform him of what had taken place. Based on what he had heard at that point, he believed that an inspector had been threatened, and he thought this was serious enough so that the Plant Manager should be informed of it (TR at 2073-77). After

⁶In actuality, February 21 was the 16th consecutive day complainant had worked. He worked an average of 11.5 hours a day in the preceding 15 days. *See* CX 10.

⁷When checking with a QC supervisor regarding complainant's hours, Brozski found out that one other contract inspector, Joe Springer, who was a project manager, had exceeded the 72 hour limit, contrary to the schedule Springer and Brozski had worked out (TR at 3400-03, 3663). Brozski met with Springer, went over his schedule, and ordered Springer to take a day off the following weekend (TR at 3404). Due to the nature of Springer's duties and the schedule of the other project manager, that was the soonest a day off for Springer could be arranged (*id.*). All of the other Raytheon employees had been off one day the previous weekend, and other than complainant and Springer, only one -- J. R. Pavlinik -- had not had at least one day off the week of February 11-17, 1997. *See* CX 10.

relating the story to Schmeiser, they decided to expand the investigation of the incident to question all of the workers who were in the diesel generator building at the time the altercation took place (TR at 2075). They also decided that the incident should be reported to the NRC on-site inspector, Hunegs (*id.*). So Curry and Brozski went to see Hunegs and told him what complainant said had taken place in the diesel generator building on February 21st, at which point they found out that complainant had already talked to Hunegs (TR at 2077-78). It is clear that Con Ed's management took this incident very seriously and responded in an appropriate manner.

While this investigation was going on, complainant went to see Doyle's supervisor, William O'Toole, to complain about the way Doyle treated him at the Emergency Diesel Generator Building on February 21 (TR 464-67). Complainant asked O'Toole to discipline Doyle in some manner for the way Doyle treated him that afternoon (TR 470). Shortly thereafter, O'Toole met with Doyle to discuss the incident, since he was concerned about complainant's perception that he was harassed (TR 498, 531). Although Doyle did not agree that he treated complainant unprofessionally or had intimidated him, O'Toole told Doyle that regardless of what actually occurred, complainant's perception that he had been mistreated was a problem in itself (*e.g.*, TR 542). When the investigation of the events of February 21st was finally completed, it appears that the Con Ed supervisors were not exactly sure what had occurred or who was most at fault (TR at 521, 2164-65). It was decided that Doyle would receive verbal counseling about treating people professionally and avoiding arguments (TR 542-43). Doyle also was told by Curry to talk to complainant to smooth other things between them (TR at 2170-71). Doyle stated that he ran into complainant on February 25 and went over to him. They both agreed that everything had been blown out of proportion. Then they shook hands, and Doyle believed the incident was behind them (TR 2257). No other disciplinary action against Doyle was taken,⁸ and none at all was taken against Sikura, and apparently the incident was laid to rest by Con Ed within a week after it occurred.

It is vital to this case to understand complainant's state of mind following the February 21st incident. Complainant testified that his being forced to perform an inspection against his will was illegal, and therefore a very serious matter (TR at 1301). He stated that Con Ed was seeking "[to] isolate me and to neutralize me from obtaining information or to escalate my concern further." (TR at 1300) He believes that at the time he met with Brozski on February 21st Con Ed already knew he went to see the NRC site representative (TR at 1298), and they made him take the day off on February 22nd as part of their attempt to "neutralize" him (TR at 1298-1300).⁹

⁸Con Ed states that it did discipline Doyle, in that a letter of reprimand was placed in his file. But this action may not have been carried out.

⁹However, elsewhere in his testimony, complainant stated that he did not know if he went to see the NRC on-site inspector, Hunegs, before or after he met with Brozski on the 21st. TR at 1601-06. It goes without saying that Brozski could not have required complainant to take off on February 22nd for complaining to the NRC about the incident in the Diesel Generator Building if complainant had not yet complained to the NRC.

Because following his meeting with Brozski he already was convinced that Con Ed was out to get rid of him (TR at 1301), prior to returning to work on February 23rd complainant purchased a small tape recorder with which to surreptitiously record conversations with co-workers and supervisors “with the intention of now formalizing my complaint and having a recording of that complaint, possibly for clarity.” (TR at 1306; *see also* CX 14-3)¹⁰ Complainant testified that he was “suspicious, scared ...” (*id.*), and it appears that from that point forward he interpreted every action Con Ed took as part of this alleged plan to get him. This attitude on complainant’s part apparently had a negative impact on his relationships with his co-workers, although the record indicates that his relationships with his co-workers had begun to deteriorate prior to February 21, 1995. *See, e.g.*, TR at 2084-86, 2462-63, 3098-99.

On approximately March 3, 1995, complainant was transferred from the mechanical construction department to the electrical construction department (TR at 318). Curry testified that Tom Gencarelli, the construction manager, and Bill Geider, the project support manager, came to see him shortly after the incident at the Emergency Diesel Generator Building. They felt that there was friction developing between complainant and the workers at that building, and they requested that complainant be moved to other work areas (TR at 2083-84). But Curry refused at that time because he did not want work groups to believe they could get an inspector removed by complaining about him (TR at 2087; CX 15-1)). Nevertheless, complainant apparently had the same impression regarding his relationship with the other workers at the Emergency Diesel Generator Building, and within the next few days he and Brozski discussed moving complainant to another work group (TR at 309-10; 324-25). Since electrical work was picking up, and complainant had a good relationship with the workers in the electrical group, complainant was given the option of transferring to the electrical construction department, and he accepted the change, which was to become effective when his work on the mechanical job in the Emergency Diesel Generator Building was completed (TR at 333-34, 2087-88).

After moving to the electrical construction group, within a few weeks another incident occurred. On March 27th,¹¹ two jobs were to be performed in the Vapor Containment Building, which houses the nuclear reactor, by a mechanic named Mike Narcissi. One was a simple job to change some fuses, which it turned out had already been changed (TR 2784, 2844-50). The other involved some wire determinations in Motor Control Center 28 (“MCC 28”), in which Narcissi was to assist Paul Cherian, an electrical engineer (TR at 2766-68). Apparently, complainant was assigned to inspect the fuse job, but the QC Department had not been informed that the wire determination job was being performed, and therefore had not assigned an inspector to it (TR at

¹⁰Transcripts of some of these tape recordings, including one of a February 23rd meeting with Brozski and Trombetta, are in evidence as CX 12 and 13. There are no “smoking guns” in these transcripts.

¹¹There was a great deal of testimony that the events in question which occurred in the Vapor Containment Building occurred on March 28th. However, it is clear that they occurred on March 27th. *See* TR at 2776-79; CE 18-19, 280-81.

2477-79). However, Cherian and Narcissi assumed complainant had been assigned to both jobs (TR at 2769), and complainant, despite ample opportunity to do so, gave no indication that was not the case (TR at 2779-80).

After it had been determined that all the fuses had been changed, Cherian and Narcissi began the job on MCC 28. During the course of this job, Cherian found that the wires were such a mess that he had Narcissi remove the “bucket”, a small compartment which houses the electrical control equipment, to get a better look at the wires (TR at 2767, 2786). Although nothing in the work package for the job stated that the bucket was to be removed, Cherian stated that permission to do so if necessary was implied (TR at 2787; *see also* TR at 2923), and that he has done so in the past on other jobs (TR at 2788). On one of those jobs, complainant was the QC inspector and signed off on the work without complaint (TR 2807; CE 342-49; *see also* TR at 2843, 2866, 3017). So Narcissi pulled the bucket, all the wires were removed and tagged with temporary tags, a wire that had not been connected was reconnected, and discrepancies in the labeling of the wires were noted (TR at 2793-94). However, since they did not have the proper labels with them, the job could not be completed at that time. So all the wires were reconnected, the bucket was replaced into MCC 28, and they left the building (TR at 2794-95). Complainant was with Cherian and Narcissi for the entire four hours or so they spent in the Vapor Containment Building, and did not ask any questions regarding the paperwork for the job or about the work that was being performed (TR at 2795, 2804-06, 2854). In fact, complainant signed off on each step of the procedure on the “Disconnect/Reconnect Report” (TR at 2797-99; CE 18-19).

It was Cherian’s intent to obtain the proper labels and finish the MCC 28 job after lunch on March 27th. However, complainant could not be located, and they could not complete the job without the QC inspector (TR at 2801). After telephoning and paging complainant proved unsuccessful, Narcissi told his supervisor, Fred Bismarck, and asked him what they should do (TR at 2860). Bismarck told Narcissi to see if he could find the complainant in places where there were no paging systems, and in the meantime he would call the QA office, hoping that complainant was there (TR at 2902, 2909). When QA could not locate complainant, the supervisor said he would send down another inspector to complete the job (TR at 2909).¹² Bismarck thought that was the end of the situation, but sometime later that day complainant showed up in his office and he was upset that Bismarck had called his boss (TR at 2909, 3000). At this point Bismarck called Narcissi and asked him to come to his office (the electrical construction field office) so he and complainant could get everything squared away (TR at 2914, 3001). When Narcissi showed up, he and complainant got into an argument regarding the completion of the project in the Vapor Containment Building (TR at 2863). Then Tony Breschia, the superintendent of electrical construction and Bismarck’s supervisor, who was in Bismarck’s office at the time, broke up the argument and told complainant to leave (TR at 2915, 3005).

¹²It turned out that the other inspector would not complete the job because he did not witness the earlier work. TR at 2863, 2912. The job was finally completed on March 31st (CE 20-21, 2776).

Complainant contends that he came to Bismarck's trailer to check out the work package on the MCC 28 job because he had observed a nonconforming condition while they were working on it. Complainant alleges he was prevented from doing so by Breschia (TR at 1326). But the evidence does not bear him out.

It appears that nothing else happened in connection with the March 27th work in the Vapor Containment Building until March 30th, when complainant went to his supervisor, Bob Trombetta, and told him that no work package existed for the work performed that day (TR at 2478). Although that concerned Trombetta and Brozski when it was brought to their attention, they were more concerned with the fact that they had been unaware that this project was to be undertaken and thus had not assigned a QC inspector to it (TR at 2478-79; *see also* TR at 3417-18). Brozski determined that an Open Item Report ("OIR") would be written regarding these two issues, and that it would be written by Trombetta (TR at 3417-18). An OIR is a report of a nonconforming condition that can be written by anyone, not just inspectors (TR at 272). About 1200 are written in the course of a year (TR at 553, 2095). Complainant stated that, in the 18 months he worked at IP2 during his last period of employment there, he wrote about 20 OIRs (TR at 1733). He is unaware that anyone has ever been disciplined because his or her work was subject to an OIR (TR at 1735-37; *see also* TR 2095). Moreover, complainant could not identify any instances where he had been disciplined for issuing an OIR (TR at 1827-77). In fact, complainant testified that he had no fear of reprisals from Con Ed for anything he did while performing his duties as an inspector (TR at 1746-49). Complainant was very unhappy that he was not being given the opportunity to write up the OIR (TR at 1329, 3419). Based on this OIR, Con Ed's procedures were changed to specify that the buckets are to be removed in similar circumstances (TR 3011-12).

After the OIR was issued, complainant was once again transferred, to the House Maintenance Group. Brozski testified that complainant told him his relationship with the electrical work group was not good (TR at 573, 3422), a feeling which apparently was reciprocated by the electrical construction workers (TR at 2483). Brozski suggested the transfer to House Maintenance (TR 572, 3423). At House Maintenance, the inspection work was similar, but the focus was on preventive maintenance rather than construction work (TR at 2451-52). Moreover, the outage at IP2 was coming to an end, and House Maintenance was one of only two areas where inspectors would continue to be needed (TR 2097). Brozski stated that complainant thought over the move, and came back the following day agreeing that it would be for the best (TR at 572, 3427-28).¹³

Complainant continued to perform inspection duties in the House Maintenance Group. Then on June 8, 1995, with outage work coming to an end, complainant was assigned to inspect a job in the Construction Department regarding the construction of the Unit One resin storage tank for the storage of radioactive waste. The storage tanks were being built because the Barnwell

¹³ Although complainant denies requesting or agreeing to the transfer to House Maintenance (TR at 1329), I credit Brozski's version for the reasons stated above.

facility in South Carolina where they had previously shipped their radioactive waste had been closed to their use by the Governor of South Carolina (TR at 448-50). At that time, this was the only project remaining from the 1995 outage for which the inspection staff had been augmented beginning in 1994 (TR at 431). On June 12, 1995, complainant wrote two OIR's for weld defects he found on that job (TR at 1356-58; CX 16, 16-1). Following these inspections, he continued working in House Maintenance. Then, in mid-June, Con Ed got notice that the Barnwell facility would once again accept Con Ed's radioactive waste (TR at 448, 2104; CE 68; CX 27). Accordingly, Con Ed no longer needed to construct its own radioactive waste storage facility (TR at 448, 2104). Brozski stated he was notified not later than June 23rd that Barnwell was opening up to receive Con Ed's waste (TR at 550; CX 19). Therefore, the construction of the resin storage tank was stopped (TR at 431). Once this job was stopped, Con Ed no longer needed more inspectors than it had prior to the time it was preparing for the outage (*id.*; TR at 2104). So on June 23, 1995, Brozski gave notice to three of the four least senior contract inspectors remaining at IP2 -- Valenzuela, Sroka and Steele -- that their employment was being terminated (CX 19). Complainant, who was the fourth, was off on June 23rd, so he was not notified of the layoff until June 26th (*id.*; TR at 432-33). Both he and Valenzuela were to be terminated as of July 21, 1995; Sroka and Steele, who were hired after complainant and Valenzuela, were to leave sooner (CX 19; TR at 444). Raytheon was notified of the projected layoffs by e-mail from Brozski on June 26th (CX 19). Subsequent to the layoff of these four inspectors, only a few long-term (called "steady-state") contract inspectors were retained, and these inspectors had worked at IP2 for at least five years (TR at 2501-52, 2105).¹⁴ No contract inspectors taken on subsequent to the 1993 refueling outage remained with Con Ed after complainant and Valenzuela were laid off (*id.*).

Although complainant makes much of the fact that there are apparent discrepancies in the reasons given by Curry and Brozski for his being laid off (*see Complainant's Post Hearing Brief* at 33-35), these differences clearly are only semantic in nature. There is no doubt that complainant, Valenzuela, Sroka and Steele became expendable when the Barnwell facility reopened, causing Con Ed to terminate the resin storage tank construction job. Terminating this job freed up the remaining steady-state inspectors to perform the house maintenance inspections, the only inspection work still going on once the storage tank construction was ended. Further, between the time complainant was laid off and the hearing, Raytheon did not supply any additional contract inspectors at IP2 (TR at 2013).

Following the notice that he was going to be laid off, complainant went to see the NRC on-site inspector, Barry Westreich (CE 222, at 40-41). At complainant's request Con Ed's ombudsman, Diane Poirier, also attended this meeting (*id.* at 41; *see also* TR at 2376). At the meeting, complainant discussed the Emergency Diesel Generator Building incident; that he was made to take a day off following it; and complained that he was transferred from the construction group because he was too tough on them (CE 222, at 43-45; TR at 2377). Complainant admitted

¹⁴At one time during the outage, as many as 50 contract inspectors were working at IP2. *See* TR at 1727.

at that time that he was being laid off due to a lack of work, not in retaliation for his work activities (CE 222, at 55-56 CX 39-1; TR at 2378-79; *see also* CE 51). Complainant then prepared a written statement to submit to the NRC (*see* CX 14), which he was told not to do on Con Ed's time (TR 1377-78). Nevertheless, he completed the statement and submitted it to the NRC.

On July 18, 1995, complainant attended a long meeting which he requested with Steven Quinn, the Vice President for Nuclear Power at IP2. Also attending were Diane Poirier, Con Ed's ombudsman, and Attorney Kenneth Standard (*see* CX 50). The meeting was tape-recorded by both claimant and Con Ed (CX 50-3). At the meeting, all of complainant's concerns were discussed. Complainant left IP2 on July 20, 1995 (TR at 1381). He did not work again as an inspector in the nuclear industry until October, 1996.

Complainant contends that all of the incidents at Con Ed beginning with the February 21, 1995 incident at the Emergency Diesel Generator Building have caused him emotional distress and depression (TR at 1381-82). He also suffers from headaches and chest pains which he attributes to the incidents (TR at 1394).

b. Discussion

Under 42 U.S.C. §5851:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954[42 U.S.C.A. §2011 *et seq.*], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954[42 U.S.C.A. §2011 *et seq.*];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic

Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*], or proceedings for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*].

The case law interprets these provisions very broadly, and finds protected such activities as filing safety-related complaints with the NRC (*e.g.*, *Collins v. Florida Power Corp.*, 91-ERA-47, 49 (Sec’y May 15, 1995)) or with the utility (*e.g.*, *Mackowiak v. University Nuclear Systems, Inc.*, 725 F.2d 1159 (9th Cir. 1984), refusing to perform work due to a safety concern (*e.g.*, *Sartain v. Bechtel Constructors Corp.*, 87-ERA-37 (Sec’y Feb. 22, 1991)), or merely questioning a utility’s safety procedures (*e.g.*, *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec’y Sept. 17, 1993)). In addition, personnel performing quality control functions are generally engaged in protected activity (*e.g.*, *Richter v. Baldwin Associates*, 84-ERA-9, 10 (Sec’y March 12, 1986)). Further, a safety-related complaint need not be meritorious to be protected. *See, e.g.*, *Oliver v. Hydro-Vac Services, Inc.*, 91-SWD-1 (Sec’y Nov. 1, 1995).

However, just because complainant engaged in inspections does not mean that he is immune from adverse action for his conduct. Surely, an inspector would not be protected from adverse action for performing his inspections poorly, performing inspections assigned to other inspectors rather than those which are his responsibility, failing to comply with company procedures in reporting safety concerns, or racially or sexually harassing other employees while performing inspections.

In cases arising under the ERA and other statutes protecting whistleblowers, it is the complainant’s burden to prove that:

1. He engaged in conduct protected by the applicable statute;
2. The party charged with unlawful discrimination knew of his protected activity;
3. He was subject to adverse action; and
4. The adverse action was motivated, in whole or in part, by his protected activity.

See, e.g. *Dartey v. Zack Co.*, 82-ERA-2 (April 25, 1983); *McCuiston v. TVA*, 89-ERA-6 (Nov.

13, 1991); *see also Mackowiak v. University Nuclear Systems, Inc., supra*. For the purposes of this decision, I will assume that complainant was engaged in protected activity under the ERA at all times relevant to this case. Nevertheless, I find that the complainant has failed to establish one or more of the three remaining elements in regard to each incident and/or each adverse action.

In an attempt to simplify this decision, I will discuss the alleged adverse actions chronologically to determine whether Con Ed illegally discriminated against the complainant.¹⁵

This discussion will address one or both of the following issues regarding each alleged act of discrimination. First, did Con Ed take an adverse action against the complainant? Second, if so, was this adverse action taken in retaliation for the complainant's having engaged in protected activity?

"An adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997). Clear examples of adverse employment actions include dismissal, demotion, or an involuntary transfer to a less desirable position. *See Mandreger v. Detroit Edison Co.*, 88-ERA-17 (Sec'y March 30, 1994); *Nichols v. Bechtel Constructors, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992); *English v. General Electric Co.*, 85-ERA-2 (Sec'y Feb. 13, 1992). Monetary loss is not required. *See Boytin v. Pennsylvania Power and Light Co.*, 94-ERA-32 (Sec'y Oct. 20, 1995).

Any discussion in this case must begin with the February 21, 1995 incident in the Emergency Diesel Generator Building. As noted above, it is being assumed for the purposes of this decision that the complainant was engaged in protected activity under the ERA at the time the incident took place. Complainant alleges he was subject to an adverse action in being harassed and intimidated by Sikora and Doyle at the Emergency Diesel Generator Building on February 21, 1995. I do not agree. What happened on February 21st was a run of the mill disagreement among co-workers, nothing more, nothing less. No punches were thrown, no one was threatened with physical harm, and no one got hurt. Moreover, the squabble was precipitated by the complainant, who insisted on inspecting a weld which did not have to be inspected and then refused to do the inspection when the workers acquiesced in his demand. In the end, at the strong urging of Doyle, he finally performed the inspection he demanded to perform in the first place. That Sikora may have tugged at his sleeve to get his attention, or Doyle may have told him to get out if he was not going to perform the inspection, cannot be considered adverse action, especially since neither of these individuals had any supervisory authority over the complainant. In this regard, *see Marien v. Northeast Nuclear Energy Co. et al.*, 93-ERA-49 & 50 (Sec'y Sept. 18, 1995), in which it was held that one co-worker yelling at another co-worker, without more, was

¹⁵Some of complainant's contentions do not merit separate discussion as acts of discrimination. That he may have been forewarned by Con Ed employees not to go to the NRC, or was "[h]arassed" by a co-worker into making a log entry which he was required to make, or was "[n]ot permitted to formally write [a] complaint to [the] NRC on company time" (*see Complainant's Post-Hearing Brief* at 6-7) clearly are not adverse actions.

not an adverse action under the ERA.

Moreover, it is hard to credit complainant's contention that he was intimidated by Sikora and Doyle. Complainant has made much of his physical prowess during the course of this proceeding. He has black belt in karate (TR 1612-13), is an excellent baseball player (TR at 1611), and lest it be forgotten, threatened to beat up a co-worker. He certainly talks a tough game. Although Sikora and Doyle are both much bigger men than the complainant (though neither appeared to be as tall as six feet), they appear to be overweight rather than muscular whereas complainant, who is of no more than medium height, has a very athletic build. I cannot accept the proposition that complainant felt intimidated by Sikora or Doyle (*cf.* TR at 1749). Instead, I believe, as complainant testified, that the incident left him embarrassed; he felt that he lost face with his co-workers because he was made to perform an inspection against his will (TR at 1593-99). In any event, nothing happened on February 21, 1995 in the Emergency Diesel Generator Building which in any way constitutes an adverse action against the complainant.

Complainant next contends he was subject to adverse action later on February 21st when Brozski made him take off the following day, a day he was scheduled to work. Being made to take a day off from work without pay clearly is an adverse action. So the question becomes whether this action was taken in retaliation for protected activity. Although the adverse action clearly was taken in response to the incident at the Emergency Diesel Generator Building, I find it was not taken in retaliation for complainant's protected activity of performing an inspection. Rather, since complainant had been involved in a confrontation, and was still very agitated when meeting with Brozski later that afternoon, Brozski was led to think that complainant was working too many hours and needed some time off. His examination of complainant's recent work schedule confirmed his suspicion. Moreover, the record clearly shows that at the time Brozski decided to give complainant the day off on February 22nd, neither Brozski nor anyone else in complainant's supervisory chain had any reason to believe that he had done anything wrong. In fact, they believed just the opposite, that he had been improperly threatened in the performance of his inspection duties, and the actions taken by Con Ed's management over the next few days are consistent with this belief. Nor was complainant made to take February 22nd off from work because he met with the NRC on-site inspector, Gordon Hunegs. For one thing, the evidence fails to establish that complainant had met with Hunegs before Brozski told him to take February 22nd off. Second, even if he had already met with Hunegs, Brozski did not know about that meeting until he met with Hunegs a couple of days later. Therefore, I find that complainant's being told to take February 22nd off was not an act of discrimination.

Complainant next contends that Con Ed's failure to discipline Sikora and Doyle for their roles in the February 21st incident at the Emergency Diesel Generator Building was discriminatory. However, it is a dubious proposition that Con Ed's failure to discipline other employees is an adverse action *against the complainant*. A more serious contention is that complainant, in early March, was transferred from the mechanical construction group to the electrical construction group due to the February 21st incident. There are two issues here. First, was complainant's transfer to the electrical construction group an adverse action? Although the

case law is clear that a transfer to a less desirable position may constitute an adverse action, *see, e.g., Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), there are no indicia here that complainant's transfer was to a less desirable position. Specifically, the transfer did not involve a loss of status or pay (TR at 1666-67). Complainant continued to perform similar job duties in the same location on the same shift. He even worked out of the same office, and apparently had the same supervisors. Further, complainant testified that it did not matter to him whether he performed mechanical or electrical inspections (TR at 1665). Under these conditions, I find that complainant's transfer to the electrical construction group in early March, 1995 was not an adverse action.

But even if this transfer could have been an adverse action if it was involuntary, I find that complainant agreed to the transfer. A truly voluntary transfer cannot be an adverse action. Finally, I find that in any event this transfer was not in retaliation for complainant's protected activity on February 21st. For one thing, as noted above, Con Ed did not believe complainant engaged in conduct in the Emergency Diesel Generator Building on February 21st that merited disciplinary action. They believed he was the victim regarding that incident, not the party at fault. His complaints regarding the February 21st incident were seriously considered by everyone at IP2, including the Plant Manager, the Q/A Director, and the Ombudsman. Second, although complainant went to see Hunegs, the NRC on-site inspector, on February 21st, and by the time complainant was transferred to the electrical construction group Con Ed knew he had done so, the evidence establishes that Con Ed was not concerned that complainant went to see Hunegs. Not only did Curry and Brozski make sure that complainant was aware he could go to the NRC to report any concerns he might have, but they went to see Hunegs themselves to report the February 21st incident to him prior to their being made aware that the complainant had already seen him. Instead, complainant was transferred because he and the mechanical construction workers were not getting along well, and it was felt that he could work better with the electrical construction workers. Although some of this animosity between complainant and his co-workers may have arisen from the February 21st incident, Con Ed's motive in arranging the transfer was not retaliation for protected activity.

After less than a month in the electrical construction group, complainant was again transferred, this time to House Maintenance, and he contends this was another adverse action due to discrimination. Specifically, he states that he was transferred to House Maintenance against his will due to his protected activities in connection with the work performed in the Vapor Containment Building, including his involvement in the OIR issued by Trombetta. Once again, however, I find that complainant's transfer to another department was not an adverse action. Complainant still performed the same inspection duties at the same worksite with no loss of pay. Although complainant does contend that working for House Maintenance was not as prestigious as working in construction (TR at 1668), there is no other evidence to support this impression. Further, since construction work was winding down, it was almost inevitable that he would be transferred to House Maintenance at some time prior to being laid off. In any event, the evidence establishes that complainant's transfer to House Maintenance was not in retaliation for his inspection duties at the Vapor Containment Building. Instead, the evidence confirms that the

complainant, with his confrontational personality, simply wore out his welcome in the electrical construction group, and was transferred for the sake of harmony in the workplace. In regard to the OIR, the evidence shows that the issuance of an OIR was an unexceptional event which had no repercussions for either inspectors or the work groups and which would not have precipitated retaliation either from Con Ed or from other workers. Finally, as indicated above, I find that complainant agreed to the transfer.

Next, complainant contends that he was:

Treated somewhat less than cordial. Management and co-workers treated him differently after he complained about illegal behavior. Was ostracized and ignored and made to feel unwelcome in new area.

Complainant's Brief at 6. Although it may be possible that ostracism by one's co-workers and behavior designed to make a worker feel unwelcome can reach the level where it constitutes adverse action, claimant failed to establish that such treatment was directed at him. In addition, he has not shown that any of his co-workers were concerned with the fact that he engaged in protected activity such as going to the NRC or issuing OIRs. Complainant's allegation that management treated him differently after he complained about allegedly illegal behavior appears to refer to his being required to put in a log book entry shortly after he was transferred to the electrical construction group (*see* Complainant's Brief at 31; TR at 1334-35). This single event does not constitute a course of conduct sufficient to establish that complainant was treated differently after he reported illegal behavior. Accordingly, claimant has failed to establish that this alleged conduct actually occurred or would constitute adverse action if it had occurred.

That gets us to the most significant yet least substantial of complainant's allegations -- that he was terminated by Con Ed in retaliation for all of his protected activity. This allegation is baseless. As is absolutely clear from the evidence discussed above, complainant was laid off after the outage when work for him was no longer available. Complainant and Valenzuela, who were the first of the contract inspectors hired in connection with the outage, were the last to be let go. After they were laid off, only steady-state contract inspectors remained. In light of this overwhelming evidence that the work for which complainant was hired had been completed, in order to prove that he was a victim of discrimination complainant would have to show either that Con Ed laid off all of the other contract inspectors hired since complainant and Valenzuela just to enable it to retaliate against complainant, or that after complainant was laid off Con Ed brought in other inspectors to replace him. The evidence does not even hint that Con Ed acted so diabolically. Instead, despite all the provocations, Con Ed stuck to its first hired-last fired policy (*see* TR at 663, 2097) and kept complainant on until all of the outage work was completed and then some. There is simply no evidence that complainant was laid off in retaliation for engaging in protected activity. In fact, complainant admitted to NRC on-site inspector Barry Westreich that he was laid off due to lack of work, not due to retaliation for protected activity.

Finally, complainant contends that after he was laid off and filed complaints with the NRC and the Department of Labor, performance evaluations were prepared recommending that he not be rehired, and that these poor evaluations were in retaliation for filing the NRC and DOL complaints. Poor performance appraisals can be an adverse action; in fact, the Secretary has held that even a “good” performance rating similar to past ratings can be an adverse action. *See Boytin V. Pennsylvania Power and Light Co.*, *supra*, slip. op at 6. The record reflects performance evaluations dated September 25, 1995 from QA supervisors Ferretti, Margrey, Trombetta, and Fitzgerald (CX 49). Each rates complainant highly in regard to his technical ability. Yet Margrey, Trombetta and Fitzgerald rate him very low in working with others and in attitude, and recommend that he not be rehired. Ferretti gave complainant a middle rating in attitude and working with others. However, noting complainant’s refusal to perform a job because he felt it was “demeaning”, Ferretti gave complainant the second lowest rating in the “Recommend to rehire” category. I find that these performance ratings clearly constitute an adverse action.

However, I also find that these evaluations were not retaliatory; rather, they are an accurate reflection of complainant’s performance. In regard to his difficulty getting along with others, complainant admitted to having disagreements with virtually everyone with whom he has worked. This is reflected as far back as July, 1994, in an evaluation prepared by the Raytheon on-site supervisor, Fred Axmacher (CE 46-47). In his evaluation, Axmacher gave complainant the lowest rating in “Working with others” and “Cooperation with other QC [personnel]”. He went on to explain that complainant would not talk to his fellow QC inspector, Luis Valenzuela, and that Con Ed supervisors refuse to deal with complainant because “he rides roughshod over them” (*id.*). He stated that complainant did not get along well with the other inspectors because he believed he was better than they were (TR at 3236). Complainant refused to sign this evaluation (TR at 3234).

Since Axmacher prepared that evaluation, complainant was suspended for two days for threatening Valenzuela; the Emergency Diesel Generator Building incident occurred; complainant refused to perform a log book entry for Fitzgerald; complainant got into an altercation with Narcissi and Breschia over the Vapor Containment Building inspection; he had another altercation with a worker named James Kerrigan (TR at 1669, 1886-87); and he refused to make a copy of something for Ferretti (TR at 1901-07). It is clear from the record that complainant believed that other workers, including his supervisors, had an obligation to respect his authority and cooperate with him, but he had no reciprocal obligation. The performance evaluations filed on September 25, 1995 reflect the fact that working with complainant had reached the intolerable point regardless of his competence as an inspector; and I find that they were not retaliatory.

In sum, complainant has failed to prove that the respondents discriminated against him due to activity protected under the ERA. Any adverse actions taken against the complainant from February 21, 1995 through the preparation of his performance evaluations on September 25, 1995 were taken for legitimate business reasons and were not retaliatory. Therefore, it is recommended that this case be dismissed in its entirety.

RECOMMENDED ORDER

IT IS RECOMMENDED that the this case be dismissed.

JEFFREY TURECK
Administrative Law Judge